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# The Pedagogical Code

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# The Pedagogical Code

Michael McAuley\*

## I. INTRODUCTION

Like colored chips of glass sandwiched and rotated between the disks of a kaleidoscope, the provisions of a bound civil code form patterns of juridical thought in constantly changing symmetry. The intellectual rotation, in time and in space, of a civil code changes the importance, force and spirit of its provisions. Sometimes and for some people, codal provisions appear only to command; at other times and for others, they invite, exhort, annunciate, and instruct. No citizen approaches the code in an identical manner nor does any citizen receive identical normative and non-normative messages. It has always been thus, and that it is thus is good.

It is good that the sometime Louisiana jurist Mitchell Franklin had his own way of looking at civil codes. For Franklin, a civil code had a pedagogical vocation. This article is an apology for Franklin, and an invitation to reconsider (and instill) public instruction as a principle of codification for the civil codes of all peoples and especially for the civil code of the people of Louisiana.

The Louisiana Civil Code is a stew of Romanist legal science seasoned with Anglo-American common law ideas and institutions in part beautifully written<sup>1</sup> and in part barbarously drafted.<sup>2</sup> The Louisiana

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\* Michael McAuley is the Clarence W. Edwards Associate Professor at the Paul M. Hebert Law Center of Louisiana State University. The ideas set forth in this article were first articulated on May 16, 2003 as an address to a meeting of the Association Henri Capitant at the Paul M. Hebert Law Center on the occasion of the Association's *Rencontres Louisianaises* held to celebrate the Louisiana Bicentenary. This paper is a reworking of that address delivered under the title *A Man, a Code and an Approach—Mitchell Franklin and the Pedagogical Vocation of a Civil Code*. McAuley is grateful to Professors Robert A. Pascal, J.-R. Trahan, and A. N. Yiannopoulos for their careful reading of this paper and their many helpful comments.

1. Mitchell Franklin, *Benjamin Dart's Civil Code of the State of Louisiana*, 7 Tul. L. Rev. 632 (1932–1933) (book review). Franklin states: "As a cultural document the Civil Code has its own merit. It is beautifully written, and so carries on the best tradition of civilian aesthetics. It is a fit companion to the federal Constitution of 1787 and the Massachusetts Constitution of 1780 as a document of the first importance in the history of American literature, and it is probably written in better English than any legislation in England." *Id.* at 633.

2. See generally A.N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 Tul. L. Rev. 830 (1980) (discussing the impact of the changes to the civil code on the civil Digest); Vernon V. Palmer, *The Death of a Code—The Birth of a Digest*, 63 Tul. L. Rev. 221 (1998) (detailing the deficiencies of the Louisiana civil code

Civil Code of today is not the civil code of Franklin's time but can nonetheless be said to belong to that family of civil codes inspired by the French *Code civil*.<sup>3</sup> A French-styled code or code *au sens européen* has recently been dubbed "*une codification (ou recodification) moderne à la française*."<sup>4</sup> According to some, such a French-styled code should not have a pedagogical vocation.<sup>5</sup> Yet, the French-style Louisiana Civil Code did (and, to a certain extent, still does) have such a vocation. The pedagogy of the 1870 Revised Civil Code (and those parts of that civil code still extant today) has been noted.<sup>6</sup>

Codal pedagogy is not just a clutch of definitions, classifications, examples, and expositions of doctrinal controversies.<sup>7</sup> It is also a method of instruction in the principles and rules established for the good governance of society and the common good of the citizenry. Franklin, like the early Louisiana jurists and redactors, was interested in the education of citizens and in convincing them of the truth and reason of a certain legal order. The method of redaction of the Louisiana Civil Code had its part to play in this education, but the true education, and thus the true pedagogical vocation, was for Franklin the very content of the code itself. The civil code had, therefore, a pedagogical externality and internality that was of interest to Franklin.

## II. FRANKLIN AND LOUISIANA LAW

Some say that this legend of a man was "frequently incomprehensible."<sup>8</sup> Others say . . . that "[s]cholarship, erudition, and

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revision); A. N. Yiannopoulos, *Requiem for a Civil Code: A Commemorative Essay*, 78 Tul. L. Rev. 379 (2003) (discussing the origins of the Louisiana civil code and its evolution).

3. See Vernon V. Palmer, *The French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, at 63 La. L. Rev. 1067.

4. Paul-André Crépeau, *La Réforme du Droit Civil Canadien: Une Certaine Conception de la Recodification 1965-1977*, 14, 15 (Éditions Thémis, 2003) (using this expression to signify contemporary codification).

5. *Id.* at 17-18 (asserting that codification is not a pedagogical effort) and John E.C. Brierley, *The Renewal of Quebec's Distinct Legal Culture: The New Civil Code of Québec*, 42 U. Toronto L. J. 484, 487 (1992): "At the same time, you will have to be alert to the undesirability of lapsing into doctrinal commentary or a pedagogic mode, since the law is ever commanding."

6. Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 Tul. L. Rev. 987, 1041-42 (1980).

7. Crépeau, *supra* note 4, at 17 where he says: "Distinguer le commandement et la science, c'est-à-dire le code civil et l'ouvrage de doctrine. Et, dès lors, éliminer, en principe, les définitions, les classifications, les exemples, de même que les querelles et controverses doctrinales, sauf pour les trancher,..."

8. Joel Wm. Friedman, *A Look Back at the Tulane Law School of John Minor*

excitement characterize[d] his classroom performance.”<sup>9</sup> There is a consensus that his classes “[were] the most vivid recollection of practically every Tulane law graduate.”<sup>10</sup> Mitchell Franklin (1902–1986), scholar, photographer, and Hegelian philosopher, held the W. R. Irby chair of law at Tulane University in New Orleans from 1930 to 1967. He wrote prolifically on constitutional law matters. His writings are tinged with notions of legal philosophy and political science. However, he had a special interest for Louisiana’s legal history of those first years after the 1803 Purchase and the change of legal *régimes* from those of Spain and France to that of the United States. This succession of states had obvious public law consequences, but it was the private law that was of apparent concern to Franklin.

State succession, as a topic of legal science, relates not only to the immediate transferability of the law but to the ultimate transmissibility of legal knowledge. In this way, a succession of states may be considered punctual on the historical timeline but there is nothing circumstantial or transient about the effects of a succession of governing entities. The transmission of private law knowledge has a custodial functionality. As notions and ideas of law are transmitted between successive governments, the safekeeping of this knowledge grows in importance. For Franklin, this custodial function resided in the incorporation of instructional elements into the Louisiana codification endeavor. Franklin, like Edward Livingston, applauded Louisiana’s peculiar expression of the private legal order—a codal expression that contained significant pedagogical material.

On the history of Louisiana law and on the succession of legal *régimes*, Franklin penned four important articles: “Concerning the Historic Importance of Edward Livingston,”<sup>11</sup> “The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana,”<sup>12</sup> “The Eighteenth *Brumaire* in Louisiana: Talleyrand

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*Wisdom’s Era*, 79 Tul. L. Rev. 2091, 2099 (1996).

9. The Board of Editors, *Mitchell Franklin: A Tribute*, 54 Tul. L. Rev. 809, 810 (1980).

10. *Id.*

11. Mitchell Franklin, *Concerning the Historic Importance of Edward Livingston*, 11 Tul. L. Rev. 163 (1936–1937) (discussing the role of Edward Livingston in the development of Louisiana law, his theories of codification, his analysis and consequent rejection of the judge-made common law, and his conception of the law-making duties of the legislator). Franklin opines that Livingston failed in the construction of a rational basis for law in Louisiana. *Id.* at 209–12.

12. Mitchell Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana*, 16 Tul. L. Rev. 319 (1941–1942) (reviewing the 1806 interest in the establishment of a legal system in the Territory

and the Spanish Medieval Legal System of 1806,"<sup>13</sup> and "Some Observations on the Influence of French Law on the Early Civil Codes of Louisiana."<sup>14</sup> This last article (published before the first three) was a presentation to yet another meeting of the Association Henri Capitant—the *Journées du droit civil français* held in Montreal from August 31 to September 2, 1934.

At these Montreal *Journées*, Franklin discussed the choices of the four legal systems "in the consciousness of Louisiana."<sup>15</sup> the Anglo-American common law, the Spanish law, the customary French law, and the new codified law of post-revolution France. As it happened, the drafting models for the 1808 Digest of the Civil Laws in the Territory of Orleans, a digest largely of the Spanish law then current, were the 1800 *Projet de l'An VIII* and the 1804 French *Code civil*. Much of the style of the 1808 Digest, which would have a lasting effect on the demeanor and intellectual bearing of the 1825 and 1870 codifications, expressed a preference for the redaction of the Year VIII Project but not because the 1804 *Code civil* was unavailable (as Wigmore curiously reported in 1916.)<sup>16</sup> The unsure footing of the English law and the uncertainty of the uncoded and customary Spanish law encouraged adoption of the French code models. Moreover, the content of both French and Spanish laws was "in the main the same."<sup>17</sup> In looking to these models, Louisiana also appropriated the bourgeois and anti-feudal ideology that underscored these texts. Although "most appropriate," in Franklin's words, the ideological history of France was not quite that of Louisiana.<sup>18</sup> Finally, owing to the then "backward" nature of legal education in the United States, the scarcity of legal materials and doctrinal resources, the Louisiana code would have to have a certain self-sufficiency.<sup>19</sup>

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of Orleans that would be principally based on Spanish medieval law and Jefferson's views on the government and laws of the Territory).

13. Mitchell Franklin, *The Eighteenth Brumaire in Louisiana: Talleyrand and the Spanish Medieval Legal System of 1806*, 16 Tul. L. Rev. 514 (1941-1942) (describing the reasons for the interest in Spanish medieval law among the French inhabitants of Louisiana in 1806, reviewing Talleyrand's proposal for the restoration of slavery and the position of the Louisiana slaveholding population, and discussing the career of Edward Livingston).

14. Mitchell Franklin, *Some Observations on the Influence of French Law on the Early Civil Codes of Louisiana*, in *Le Droit Civil Français—Livres-Souvenir des Journées du Droit Civil Français* 833 (Paris-Montréal 1936).

15. See *id.* at 833.

16. John H. Wigmore, *Louisiana: The Story of its Legal System*, 1 So. L. Q. 1, 12 (1916).

17. See generally J.-R. Trahan, *The Continuing Influence of le Droit Civil and El Derecho Civil in the Private Law of Louisiana*, 63 La. L. Rev. 1019 (2004).

18. See Franklin, *supra* note 14, at 841.

19. *Id.*

In this regard, Franklin said:

It can be ventured that the draught of Year VIII met the colonial demands better than the *Code civil français* itself because the draught of the Year VIII was more pedagogic. The Louisiana civil code to-day has 3556 articles, as against the 2281 of the *Code civil*. The difference in the length of the two codes was a difference, in no small way, between a code that was a code, and a code that was a code, a law-school and doctrine all at once.<sup>20</sup>

Franklin believed that the more ample Louisiana codes "had closed the door to the use of poorly understood materials when unforeseen, uncodified problems presented themselves."<sup>21</sup> This was Franklin's principal observation in his address to the 1934 *Journées* in Montreal, the city of his birth.

Franklin's pedagogical observations on the nature of the Louisiana civil codes were amply confirmed by his later scholarship<sup>22</sup> on the dynamic of the succession of states that occurred in the very first years of the nineteenth century, and on the consequences for the transfer and future transmission of legal knowledge—*savoir juridique*—in this state.

Franklin emphasized the political disorder of the first years after the Purchase. The Louisiana French lived lives of multiple contradictions. They wanted the freedoms of a minority yet they wanted the freedom to enslave other minorities. They desired slavery, yet still they wanted to retain some attachment to the accomplishments of the French and American revolutions. They wanted to be democratic, yet they claimed rights to Spanish medieval law. They prevaricated. They equivocated in their vision of the law. Franklin believed that the introduction of Spanish medieval law by the slave-holding French inhabitants of Louisiana, as proposed in 1806, was "not merely snobbish, pretentious and insolent, but provocative, disruptive

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20. *Id.* Franklin also states: "They [Louisiana jurists] invested the Louisiana codes with a pedagogic content, so that the code could do the work of doctrine and of the university law schools in older civil law communities." *Id.* at 844. However, Franklin does not seem to endorse unlimited pedagogic content. See Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 Harv. L. Rev. 1367, 1384 (1933-1934) (describing the Trusts Restatement (Tentative Draft No. 1, 1930)). "What of the merit of textual definitions? What of the excess of pedagogic elements, such as we find in the Trusts Restatement, and the comments generally?" *Id.*

21. See Franklin, *supra* note 14, at 844. Franklin also expressed this thought, together with that set out in note 20, in Franklin, *supra* note 11, at 211.

22. See Franklin, *supra* notes 11, 12, 13.

and counter-revolutionary.”<sup>23</sup> The Digest of 1808 was, for Franklin, the triumph of “the great France over these provincial slave-holding French.”<sup>24</sup>

This “veering about”<sup>25</sup> of the Louisianians between different legal systems was best exemplified by the life and times of Edward Livingston himself. A supporter of the continuation of Spanish law—and, arguably, of the pedagogical vocation of the Spanish law, as is clearly present in *Las Siete Partidas*—Livingston nonetheless wanted to purge this law of its medievalism. In 1806, he wanted to continue the customary anti-code pro-slavery tradition of the local law; yet, two years later, in 1808, through James Brown, one of the redactors of the 1808 Digest, he worked on and in favor of a French-inspired modern code. The contradictions in Livingston’s own life—a supporter of human dignity and autonomy yet a slaveholder and a vast property owner, a medievalist as to source materials yet a modernist as to expression of the positive law—were but the reflection of the commotion of the times.

Franklin much admired Edward Livingston, but did not blindly admire him. In particular, he admired Livingston’s work on the 1825 Civil Code. Franklin reports that Livingston’s total concern for law that has its source “in reason, truth, justice and utility”<sup>26</sup> had encouraged Livingston “to invest the Civil Code with a pedagogic content, so that the Louisiana Civil Code would also do the work of the doctrine and of the university law schools of the older civil law communities, both of which Louisiana lacked.”<sup>27</sup> Under the leadership of Livingston, the codification movement was hatched.

Indeed, in the Preliminary Report of the Code Commissioners dated February 13, 1823, Livingston and his co-codifiers, L. Moreau Lislet and Pierre Derbigny, stated, that the “French Code [has not done] as much as might have been expected in correcting the evil of continual reference to the pre-existing laws.”<sup>28</sup> Accordingly, Livingston and the other commissioners set out to make the new Louisiana Civil Code as complete as possible, “providing for as many cases as can be foreseen and rendering a reference to any other authority necessary in as few cases as our utmost care can avoid.”<sup>29</sup> A more complete code for Louisiana was necessary so that judges and

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23. See Franklin, *supra* note 13, at 516.

24. See *id.* at 546.

25. See Franklin, *supra* note 12, at 322 and Franklin, *supra* note 12, at 546.

26. See Franklin, *supra* note 11, at 210.

27. *Id.* at 211.

28. See *Preliminary Report of the Code Commissioners dated February 13, 1823*, in 1 La. Legal Archives, lxxxix (1937).

29. See *id.* at xci.

advocates would, to the greatest extent possible, have no necessity to refer to the obscure, unattainable, and contradictory pre-codification legal source materials.

Livingston drafted a pedagogical code, in both its external and internal reflections, so as to obtain a complete written expression of the law for the state's citizens. Then, just as now, the pedagogy or teaching vocation of a civil code is, in part, designed to support and ensure the survival of a certain understanding of a particular legal tradition. Franklin heartily endorsed Livingston's approach to Louisiana's legal predicament, and Franklin, like Livingston, understood the preservationist<sup>30</sup> goals of codification. In the words of the scholar Shael Herman, codification was intended to be "a frame of reference moving in time."<sup>31</sup>

There is a Louisiana tradition of codification.<sup>32</sup> In the late 1930s, Franklin's younger colleague at Tulane, James Morrison, expressed the view that any revision of the Louisiana code should be patterned on the existing 1825 and 1870 codal models. Morrison boldly and baldly asserted that "only the French Civil Code can rival the dignity, antiquity and success of the Louisiana Civil Code."<sup>33</sup> Although Morrison was no lover of definitions and decried their presence,<sup>34</sup> the abundance of these definitions, yesterday and today,<sup>35</sup> is not just a reference tool but an important textual component that bears witness to the external pedagogical look of the code. Morrison thought the terminology of the then code "vague, equivocal and imprecise," as well as "inconsistent."<sup>36</sup> He disliked the doctrinal pretensions of the Code.<sup>37</sup> He stated: "[t]he Louisiana Civil Code with its 3,556 articles contains

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30. "Preservationist" is Herman's and Hoskins' word. See note 6, at 1042.

31. See Shael Herman, *Legislative Management of History: Notes on the Philosophical Foundations of the Civil Code*, 53 Tul. L. Rev. 380, 393 (1979).

32. Current revision of the Louisiana civil code has not discarded pedagogy. The 1984 revision of the civil code's provisions on obligations does not ignore the code's teaching mission. See Saul Litvinoff, *The 1984 Revision of the Louisiana Civil Code's Articles on Obligations—A Student Symposium: Introduction*, 45 La. L. Rev. 747, 748. "It might be said that the order of presentation of a subject is a matter of only didactic importance. Perhaps, this is so. Nevertheless, a method that facilitates the learning of the law is bound to further facilitate the understanding and application of the law by those devoted to that task." *Id.* at 748.

33. See James Morrison, *The Need for a Revision of the Louisiana Civil Code*, 11 Tul. L. Rev. 213, 215 (1937).

34. See *id.* at 236.

35. See Civil Code of the State of Louisiana 995 (Benjamin Wall Dart ed., 1947) under "Definitions" in the "Combined General Index." See also Louisiana Civil Code 2003, Volume II (A. N. Yiannopoulos ed., 2003) under "Appendix 3." *Id.* at 495.

36. See Morrison, *supra* note 33, at 236.

37. See *id.* at 237.



more doctrinal disquisitions than any other code with the possible exception of the *Allgemeines Landrecht* with its more than 20,000 articles."<sup>38</sup>

This unflattering assessment of the doctrinal pedagogy of the Louisiana Civil Code was shared by another. Clarence Morrow told the Louisiana State Law Institute in 1949 that Louisiana needed a modern civil code, not a restatement, and that the "expository material" of the then Code was an "[apparent] effort to explain to a relatively untutored bench and bar [in 1825] some of the mysteries of French civil law theory as expressed in a somewhat laconic Code Napoleon."<sup>39</sup> Morrow added: "[t]here is no place for such material in the code itself."<sup>40</sup>

Morrow made these remarks when he was a full professor at Tulane University. Some six years or so earlier, when he was but an assistant professor at Tulane, Morrow was more dutiful and obliging to his senior colleague Franklin when he characterized the larger number of articles in the 1825 Louisiana code as follows: "on the whole the additional material constituted an improvement over the rather laconic French Code."<sup>41</sup> Morrow liked the word "laconic" when describing the French code; laconic meaning brief (but, also, concise to the point of seeming mysterious).

As for Mitchell Franklin, he does not seem to have cared to reply to either of his Tulane colleagues, Morrison or Morrow. Franklin had moved on to scholarly concerns consonant with his interest in codification but extending beyond the confines of its application in early Louisiana legal history.

For example, Franklin was fascinated with French encyclopaedism and its idealization of both the law generally and the civil code in particular. According to this school of thought, since the lawmaker is the pre-eminent educator, the law necessarily has a pedagogical content. Franklin relates that the theory of the enlightening or educational code is the theory of codification of the *encyclopédistes*.<sup>42</sup> They believed that the code was the supreme act

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38. See *id.* at 239.

39. Clarence J. Morrow, *An Approach to the Revision of the Louisiana Civil Code*, 23 Tul. L. Rev. 478, 484 (1948-1949).

40. *Id.*

41. Clarence J. Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 Tul. L. Rev. 351, 389-90 (1942-1943).

42. See Mitchell Franklin, *Alienation and Hegel's Justification for Codification*, 33 Tul. L. Rev. 133, 138-39 (1958-1959) (describing Hegel's justification for codification in the context of the French *encyclopédisme*) and Mitchell Franklin, *Law, Morals and Social Life*, 31 Tul. L. Rev. 465, 466 (1956-1957) (describing the content of the law as part of Roscoe Pound's conception of law). See also an earlier scholarly publication of Franklin referring

of moral and social education of the citizen.<sup>43</sup> The education of the citizen is essential to the democratic process; codification assists the citizen in a critical appraisal of the text of the law and in understanding the nature of democracy.<sup>44</sup>

An ideal civil code is an ambitious project of enlightenment. It establishes legal principles and rules. It provides a correct mechanism for their interpretation and application. It provides a context for a philosophy and an ethic as to the end of law. Livingston and Franklin considered the Louisiana Civil Code very much in this way. So should we.<sup>45</sup>

### III. PEDAGOGY AND LOUISIANA RECODIFICATION

Although caution is appropriate in assessing the importance of the non-normative elements of the Louisiana Civil Code,<sup>46</sup> the length of the 1825 and 1870 versions of this code is due, in no small way, to detailed expository material. Whether with respect to the seizin of heirs or the consent to contract, for example, the text of the code extends beyond the expression of similar concepts in the 1804 French *Code civil*.<sup>47</sup> There can be no better example of the teaching vocation of the 1825 Louisiana code than the doctrinal text of its articles 1791 and 1792 that describe the nature of consent.<sup>48</sup> Indeed the articles of

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to the *encyclopédistes* themselves as "enlightened" and "advanced:" Mitchell Franklin, *A Study of Interpretation in the Civil Law*, 3 Vand. L. Rev. 557, 557-58 (1949-1950).

43. See Franklin, *Law, Morals and Social Life*, *supra* note 40, at 466.

44. David Fraser, *Born in the U.S.A.: The Civil Law Theory of Mitchell Franklin*, 70 Telos 41, 44 (1986-1987). Fraser summarizes Franklin's work: (1) Franklin saw the democratic potential in the codification of civil law; (2) civil law leads to "a form of reasoning which requires judges to give concrete content to the texts of the Code"; and (3) the role of the judge in the civilian tradition is institutionally limited. *Id.*

45. Roscoe Pound, *The Theory of Judicial Decision*, 36 Harv. L. Rev. 641, 645 (1922-1923) (describing the elements of the "whole of what we call the law.").

46. See Nicholas Kasirer, *François Gény's libre recherche scientifique as a Guide for Legal Translation*, 61 La. L. Rev. 331, 352 (2001) (stating that one should not overestimate the non-normative vocation inherent in an enactment).

47. See articles 934-7 of the 1825 Louisiana civil code, on the topic of seizin, and compare with Article 724 of the French code. See, for consent to contract, articles 1772 and 1791-9 of the 1825 Code and compare with article 1108-9 of the French code. McAuley is grateful to Professor J.-R. Trahan of the Paul M. Hebert Law Center of Louisiana State University for drawing his attention to these provisions. The text of the 1825 and 1870 codes can be found in 3 La. Legal Archives (1942).

48. Article 1791 of the 1825 code is virtually identical to Article 1797 of the 1870 code: "When the parties have the legal capacity to form a contract, the next requisite to its validity is their consent. This being a mere operation of the mind, can have no effect, unless it be evinced in some manner that shall cause it to be

§1 of Section 1 of Chapter 2 of Title IV of Book III of the 1870 Louisiana Civil Code ("Of the Nature of Consent, and How It Is To Be Shown") are said to have no corresponding 1804 French *Code civil* provisions.<sup>49</sup> Perhaps to some, including the contemporary Louisiana redactor, the addition of doctrine is to be eschewed; yet, to others, the addition of doctrine is helpful and a felicitous demystification of the law for judges and citizens.

A civil code should contain doctrinal elements that explain the principles and rules and put them in context. Although the modern Louisiana redactor may have easy access to doctrine, no one else does. Legal doctrine in this state is, for all intents and purposes, unavailable to the citizen, and it is an outrageous conceit to pretend otherwise. The current situation, from a citizen perspective, is not far removed from the observations of Livingston, Moreau Lislet, and Derbigny on the customary laws used as sources of the 1825 Louisiana Civil Code:

the absurdity of being governed by laws, of which a complete collection has never been seen in the state, written in languages which few, even of the advocates or judges, understand, and so voluminous, so obscure, so contradictory, that human intellect however enlarged, human life however prolonged, would be insufficient to understand, or even to peruse them.<sup>50</sup>

There is nothing equivalent in Louisiana to the relatively inexpensive paperbound editions of legal materials available at countless locations in France. Yet, even were doctrinal materials everywhere to be found, the lawmaker should not require the citizen to consult outside source materials. The civil code should have a relative self-sufficiency.

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understood by the other parties to the contract. To prevent error in this essential point, the law establishes, by certain rules adapted to the nature of the contract, what circumstances shall be evidence of such assent; and how those circumstances shall be proved: these come within the purview of the law of evidence." Article 1798 of the 1870 code is the same as the text of Article 1792 of the 1825 code save punctuation amendments: "As there must be two parties at least to every contract, so there must be something proposed by one and accepted and agreed to by another to form the matter of such contract; the will of both parties must unite on the same point." The text of the 1825 and 1870 codes can be found in 3 La. Legal Archives (1942). The substance and the ideas articulated by these articles are said to have been retained by the 1984 Revision. For example, see articles 1927–29 C.C. For the text and the related comments to these articles, see Louisiana Civil Code 2003 (A. N. Yiannopoulos ed., 2003).

49. See 3 La. Legal Archives (1942) under the text of the articles of this section.

50. See *supra* note 28, at xcii.

Codal pedagogy has, as its mission, the transmission of information, on a secure and certain foundation, from the legislator to the people. Whatever is necessary to ensure exactly that transmission of information is a good thing, unless the intention of the legislator is to confound and not to enlighten the citizen.<sup>51</sup> In fact, as Franklin well knew, the debate on the external and internal pedagogical dynamic of codification centers on the role of law as a vehicle of popular empowerment. On the occasion of Louisiana's bicentenary, when judges and lawyers are called to applaud the endeavors of the last two hundred years, there has been a near total abandonment of the achievements of this state's early jurists to configure the law on a rational basis so that it might be "accessible and intelligible to all."<sup>52</sup> In this regard, there can be no better salve than a first (or renewed) interest in (and attentive study of) the *Preliminary Report of the Code Commissioners dated February 13, 1823*.<sup>53</sup>

A big pedagogical code of as many articles as it takes to explain the private legal order is a work of wonder and, in any event, no properly written Louisiana civil code could be more cumbersome than the current private edition used in the state.<sup>54</sup> However, as everyone knows (but no one admits), there is scant legislative interest in the popularization and accessibility of legal information. Even where the law has been made electronically available to the public, through the medium of the internet for example, its expression is abstruse and frustrating for the citizen reader.

Mitchell Franklin understood that the pedagogical content of the Louisiana Civil Code—by explaining, describing, defining and illustrating law—promoted the dialogic character of the law, that is to say, the ongoing discussion and interaction between citizen and legislator. It is this pedagogical character that must be maintained or restored if Louisianians today are to be as proud of the international reputation of the state's civil code as when first it was written.<sup>55</sup>

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51. According to Tronchet, the French civil code should be written to enlighten all citizens: "M. Tronchet ajoute que le Code civil n'est pas rédigé pour les juges seuls et pour les jurisconsultes, mais pour éclairer tous les citoyens." See P.A. Fenet, *XII Recueil Complet des Travaux Préparatoires du Code Civil* 263 (1827) (reprinted Otto Zeller Osnabrück, 1968). Tronchet was one of the commissioners appointed in 1800 to draft the *Project de l'An VIII*.

52. *Id.*

53. See *supra* note 28.

54. On the nature of the private edition of the Louisiana civil code published by West Group, now in two volumes but as it was published in 1998, see Robert Anthony Pascal, *Of the Civil Code and Us*, 59 La. L. Rev. 301, 306 (1998).

55. It should be noted that pedagogical codes are still alive. See Alexander S. Komarov, *Is the UCC dead, or alive and well? International Perspectives: The Uniform Commercial Code: A Russian Point of View*, 29 Loy. L.A. L. Rev. 1085, 1091 (1996) (stating that the new Russian civil code's nonmandatory rules have

At some juncture, there will be a cry for recodification of the law of this state.<sup>56</sup>

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enormous pedagogical value).

56. See Michael McAuley, *Proposal for a Theory and a Method of Recodification*, 49 Loy. L. Rev. 261 (2003).